

COMMENTARY ON ARTICLE 2 CONCERNING TAXES COVERED BY THE CONVENTION

1. This Article is intended to make the terminology and nomenclature relating to the taxes covered by the Convention more acceptable and precise, to ensure identification of the Contracting States' taxes covered by the Convention, to widen as much as possible the field of application of the Convention by including, as far as possible, and in harmony with the domestic laws of the Contracting States, the taxes imposed by their political subdivisions or local authorities, to avoid the necessity of concluding a new convention whenever the Contracting States' domestic laws are modified, and to ensure for each Contracting State notification of significant changes in the taxation laws of the other State.

(Amended on 29 April 2000; see HISTORY)

Paragraph 1

2. This paragraph defines the scope of application of the Convention: taxes on income and on capital; the term “direct taxes” which is far too imprecise has therefore been avoided. It is immaterial on behalf of which authorities such taxes are imposed; it may be the State itself or its political subdivisions or local authorities (constituent States, regions, provinces, *départements*, cantons, districts, *arrondissements*, *Kreise*, municipalities or groups of municipalities, etc.). The method of levying the taxes is equally immaterial: by direct assessment or by deduction at the source, in the form of surtaxes or surcharges, or as additional taxes (*centimes additionnels*), etc.

(Amended on 11 April 1977; see HISTORY)

Paragraph 2

3. This paragraph gives a definition of taxes on income and on capital. Such taxes comprise taxes on total income and on elements of income, on total capital and on elements of capital. They also include taxes on profits and gains derived from the alienation of movable or immovable property, as well as taxes on capital appreciation. Finally, the definition extends to taxes on the total amounts of wages or salaries paid by undertakings (“payroll taxes”; in Germany, “*Lohnsummensteuer*”; in France, “*taxe sur les salaires*”). Social security charges, or any other charges paid where there is a direct connection between the levy and the individual benefits to be received, shall not be regarded as “taxes on the total amount of wages”.

(Amended on 11 April 1977; see HISTORY)

4. Clearly a State possessing taxing powers — and it alone — may levy the taxes imposed by its legislation together with any duties or charges accessory

to them: increases, costs, interest, etc. It has not been considered necessary to specify this in the Article, as it is obvious that in the levying of the tax the accessory duties or charges depend on the same rule as the principal duty. Practice among member countries varies with respect to the treatment of interest and penalties. Some countries never treat such items as taxes covered by the Article. Others take the opposite approach, especially in cases where the additional charge is computed with reference to the amount of the underlying tax. Countries are free to clarify this point in their bilateral negotiations.

(Amended on 29 April 2000; see HISTORY)

5. The Article does not mention “ordinary taxes” or “extraordinary taxes”. Normally, it might be considered justifiable to include extraordinary taxes in a model convention, but experience has shown that such taxes are generally imposed in very special circumstances. In addition, it would be difficult to define them. They may be extraordinary for various reasons; their imposition, the manner in which they are levied, their rates, their objects, etc. This being so, it seems preferable not to include extraordinary taxes in the Article. But, as it is not intended to exclude extraordinary taxes from all conventions, ordinary taxes have not been mentioned either. The Contracting States are thus free to restrict the convention’s field of application to ordinary taxes, to extend it to extraordinary taxes, or even to establish special provisions.

(Amended on 11 April 1977; see HISTORY)

Paragraph 3

6. This paragraph lists the taxes in force at the time of signature of the Convention. The list is not exhaustive. It serves to illustrate the preceding paragraphs of the Article. In principle, however, it will be a complete list of taxes imposed in each State at the time of signature and covered by the Convention.

(Added on 30 July 1963; see HISTORY)

6.1 Some member countries do not include paragraphs 1 and 2 in their bilateral conventions. These countries prefer simply to list exhaustively the taxes in each country to which the Convention will apply, and clarify that the Convention will also apply to subsequent taxes that are similar to those listed. Countries that wish to follow this approach might use the following wording:

1. The taxes to which the Convention shall apply are:
 - a) (in State A):
 - b) (in State B):

2. The Convention shall apply also to any identical or substantially similar taxes that are imposed after the date of signature of the Convention in addition to, or in place of, the taxes listed in paragraph 1. The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws.

As mentioned in paragraph 3 above, social security charges and similar charges should be excluded from the list of taxes covered.

(Added on 29 April 2000; see HISTORY)

Paragraph 4

7. This paragraph provides, since the list of taxes in paragraph 3 is purely declaratory, that the Convention is also to apply to all identical or substantially similar taxes that are imposed in a Contracting State after the date of signature of the Convention in addition to, or in place of, the existing taxes in that State.

(Amended on 29 April 2000; see HISTORY)

8. Each State undertakes to notify the other of any significant changes made to its taxation laws by communicating to it, for example, details of new or substituted taxes. Member countries are encouraged to communicate other significant developments as well, such as new regulations or judicial decisions; many countries already follow this practice. Contracting States are also free to extend the notification requirement to cover any significant changes in other laws that have an impact on their obligations under the convention; Contracting States wishing to do so may replace the last sentence of the paragraph by the following:

The competent authorities of the Contracting States shall notify each other of any significant changes that have been made in their taxation laws or other laws affecting their obligations under the Convention.

(Amended on 29 April 2000; see HISTORY)

9. *(Deleted on 28 January 2003; see HISTORY)*

Reservations on the Article

10. *Canada, Chile and the United States* reserve their positions on that part of paragraph 1 which states that the Convention should apply to taxes of political subdivisions or local authorities.

(Amended on 22 July 2010; see HISTORY)

11. *Australia, Japan and Korea* reserve their position on that part of paragraph 1 which states that the Convention shall apply to taxes on capital.

(Amended on 15 July 2005; see HISTORY)

12. Greece holds the view that “taxes on the total amounts of wages or salaries paid by enterprises” should not be regarded as taxes on income and therefore will not be covered by the Convention.

(Added on 21 September 1995; see HISTORY)

HISTORY

Paragraph 1: Amended on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000. In the 1977 Model Convention and until 29 April 2000, paragraph 1 read as follows:

“1. This Article is intended to make the terminology and nomenclature relating to the taxes covered by the Convention more acceptable and precise, to ensure identification of the Contracting States' taxes covered by the Convention, to widen as much as possible the field of application of the Convention by including, as far as possible, and in harmony with the domestic laws of the Contracting States, the taxes imposed by their political subdivisions or local authorities, and to avoid the necessity of concluding a new convention whenever the Contracting States' domestic laws are modified, by means of the periodical exchange of lists and through a procedure for mutual consultation.”

Paragraph 1 was previously amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 1 read as follows:

“1. The Article is intended to make the terminology and nomenclature relating to the taxes covered by the Convention more acceptable and precise, to ensure identification of the Contracting States' taxes covered by the Convention, to widen as much as possible the field of application of the Convention by including as far as possible, and in harmony with the internal legislation of the Contracting States, the taxes imposed by their political subdivisions or local authorities -- and to avoid the necessity of concluding a new Convention whenever the Contracting States' taxation legislation is modified, by means of the periodical exchange of lists and through a procedure for mutual consultation.”

Paragraph 2: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 2 read as follows:

“2. This paragraph defines the subject of the Convention: taxes on income and capital; the term “direct taxes” which is far too imprecise has therefore been omitted. It is immaterial on behalf of which authorities such taxes are imposed; it may be the State itself or its political subdivisions or local authorities (constituent States, regions, provinces, “departements”, Cantons, districts, “arrondissements”, circles [“Kreise”], municipalities or groups of municipalities, etc.). The method of levying the taxes is equally immaterial: by direct assessment or by deduction at the source, in the form of surtaxes or surcharges, or as additional taxes [“centimes additionels”], etc.”

Paragraph 3: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 3 read as follows:

“3. This paragraph explains what is meant by taxes on income and capital. Such taxes comprise taxes on total income and on each element of income, on total capital and on each element of capital. They also include taxes on profits derived from the alienation of movable or immovable property, i.e. in particular capital gains and profits on real property, as well as taxes on capital appreciation. Finally, the definition extends to taxes on the total amounts of wages or salaries paid by undertakings (“payroll taxes”; in Germany, “Lohnsummensteuer”; in France the “versement forfaitaire a la charge des employeurs”).”

Paragraph 4: Amended on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until 29 April 2000, paragraph 4 read as follows:

“4. Clearly a State possessing taxing powers — and it alone — may levy the taxes imposed by its legislation together with any duties or charges accessory to them: increases, costs, interest, etc. It has not been considered necessary to specify this in the Article, as it is obvious that in the levying of the tax the accessory duties or charges depend on the same rule as the principal duty.”

Paragraph 5: Amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 5 read as follows:

“5. The Article does not mention ‘ordinary taxes’ or ‘extraordinary taxes’. Normally, it might be considered justifiable to include extraordinary taxes in a draft Convention, but experience has shown that such taxes are generally imposed in very special circumstances. In addition, it would be difficult to define them. They may be extraordinary for various reasons; their imposition, the manner in which they are levied, their rates, their objects, etc. This being so, it seems preferable not to include extraordinary taxes in the Article. But, as it is not intended to exclude extraordinary taxes from all the Conventions, ordinary taxes have not been mentioned either. The Contracting States are thus free to restrict the Convention’s field of application to ordinary taxes, to extend it to extraordinary taxes, or even to establish special provisions.”

Paragraph 6: Unchanged since the adoption of the 1963 Draft Convention by the OECD Council on 30 July 1963.

Paragraph 6.1: Added on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000.

Paragraph 7: Amended on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000. In the 1977 Model Convention and until 29 April 2000, paragraph 7 read as follows:

“7. This paragraph provides, since the list of taxes in paragraph 3 is purely declaratory, that the Convention is also to apply to all identical or substantially similar taxes which are imposed after the date of signature of the Convention in addition to, or in place of, the existing taxes. This provision is necessary to prevent the Convention from becoming inoperative in the event of one of the States modifying its taxation laws.”

Paragraph 7 was previously amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 7 read as follows:

“7. This paragraph provides, since the list of taxes in paragraph 3 is purely declaratory, that the Convention is also to apply to all identical or substantially similar taxes which are subsequently imposed in addition to, or in place of the existing taxes. This provision is necessary to prevent the Convention from becoming inoperative in the event of one of the States modifying its laws.”

Paragraph 8: Amended on 29 April 2000 by the report entitled “The 2000 Update to the Model Tax Convention”, adopted by the OECD Committee on Fiscal Affairs on 29 April 2000. In the 1977 Model Convention and until 29 April 2000, paragraph 8 read as follows:

“8. Each State undertakes to notify the other of any amendments made to its taxation laws by communicating to it at the end of each year, when necessary, a list of new or substituted taxes imposed during that year.”

Paragraph 8 was previously amended when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 8 read as follows:

“8. Each State undertakes to notify to the other any amendments made to its tax laws by communication to it at the end of each year, when necessary, a list of new or substituted taxes, imposed during that year.”

Paragraph 9: Deleted, together with the heading preceding it, on 28 January 2003 by the report entitled “The 2002 Update to the Model Tax Convention”, adopted by the OECD Council on 28 January 2003. After 21 September 1995 and until 28 January 2003, paragraph 9 and the heading read as follows:

“Observation on the Commentary

9. In contexts such as limitations on the rate of tax or the granting of credits for foreign tax, *New Zealand* would wish to make it clear that the term “tax” does not include penalties, or interest on overpayment or underpayment of tax.”

Paragraph 9 was amended on 21 September 1995, by adding the words “, or interest on overpayment or underpayment of tax”, by the report entitled “The 1995 Update to the Model Tax Convention”, adopted by the OECD Council on 21 September 1995. In the 1977 Model Convention and until 21 September 1995, paragraph 9 read as follows:

“9. In contexts such as limitations on the rate of tax or the granting of credits for foreign tax, *New Zealand* would wish to make it clear that the term “tax” does not include penalties.”

Paragraph 9 was replaced when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. At that time, paragraph 9 of the 1963 Draft Convention was amended and renumbered as paragraph 10 (see history of paragraph 10) and a new paragraph 9 was added. In addition, the heading preceding paragraph 9 was moved immediately before paragraph 10 and a new heading was added immediately before paragraph 9.

Paragraph 10: Amended on 22 July 2010, by adding Chile to the list of countries making the reservation, by the report entitled “The 2010 Update to the Model Tax Convention”, adopted by the OECD Council on 22 July 2010. After 15 July 2005 and until 22 July 2010, paragraph 10 read as follows:

“10. *Canada* and the *United States* reserve their positions on that part of paragraph 1 which states that the Convention should apply to taxes of political subdivisions or local authorities.”

Paragraph 10 was previously amended on 15 July 2005 by deleting Australia from the list of countries making the reservation, by the report entitled “The 2005 Update to the

Model Tax Convention”, adopted by the OECD Council on 15 July 2005. In the 1977 Model Convention and until 15 July 2005, paragraph 10 read as follows:

“10. *Australia, Canada and the United States* reserve their positions on that part of paragraph 1 which states that the Convention should apply to taxes of political subdivisions or local authorities.”

Paragraph 10 of the 1977 Model Convention corresponded to paragraph 9 of the 1963 Draft Convention. Paragraph 9 of the 1963 Draft Convention was amended and renumbered as paragraph 10 and the heading preceding paragraph 9 was moved with it when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977. In the 1963 Draft Convention (adopted by the OECD Council on 30 July 1963) and until the adoption of the 1977 Model Convention, paragraph 9 read as follows:

“9. *Canada and the United States* reserve their position on that part of paragraph 1 of the Article which states that the Convention shall apply to taxes of political subdivisions or local authorities.”

Paragraph 11: Amended on 15 July 2005, by adding Australia to the list of countries making the reservation, by the report entitled “The 2005 Update to the Model Tax Convention”, adopted by the OECD Council on 15 July 2005. After 23 October 1997 and until 15 July 2005, paragraph 11 read as follows:

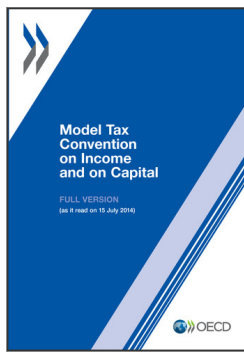
“11. *Japan and Korea* reserve their position on that part of paragraph 1 which states that the Convention shall apply to taxes on capital.”

Paragraph 11 was previously amended on 23 October 1997, by adding Korea to the list of countries making the reservation, by the report entitled “The 1997 Update to the Model Tax Convention”, adopted by the OECD Council on 23 October 1997. In the 1977 Model Convention and until 23 October 1997, paragraph 11 read as follows:

“11. *Japan* reserves its position on that part of paragraph 1 which states that the Convention shall apply to taxes on capital.”

Paragraph 11 was added when the 1977 Model Convention was adopted by the OECD Council on 11 April 1977.

Paragraph 12: Added on 21 September 1995 by the report entitled “The 1995 Update to the Model Tax Convention”, adopted by the OECD Council on 21 September 1995.



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